

Green, LindaE

From: Mychal Ozaeta <mozaeta@earthjustice.org>
Sent: Friday, May 12, 2017 11:23 AM
To: FOIA HQ
Cc: Lisa Evans
Subject: FOIA Request
Attachments: FOIA EPA 5 12 17 state authorization.pdf

Please find attached a Freedom of Information request. Thank you.

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ALASKA CALIFORNIA FLORIDA MID-PACIFIC NORTHEAST NORTHERN ROCKIES
NORTHWEST ROCKY MOUNTAIN WASHINGTON, D.C. INTERNATIONAL

May 12, 2017

BY EMAIL: hq.foia@epa.gov

FOIA Officer
FOIA and Privacy Branch
Office of Environmental Information
United States Environmental Protection Agency
1200 Pennsylvania Avenue, N.W. (2822T)
Washington, D.C. 20460

Re: Freedom of Information Act Request for Information Pertaining to State
Applications for EPA Authorization of CCR Permit Programs

Dear FOIA Officer:

Pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, I hereby request a copy of all applications from states to operate coal combustion residuals ("CCR") permit programs submitted to the United States Environmental Protection Agency ("EPA") pursuant to section 2301 of the Water Infrastructure Improvements for the Nation Act ("WIIN Act"). Specifically, I request the following documents:

- (1) A copy of all applications from states seeking EPA authorization for a CCR permit program received by EPA between the period from January 1, 2017 to June 1, 2017; and
- (2) A copy of all supporting materials accompanying any state application for a CCR permit program including correspondence, memoranda, data, reports, emails, regulations, statutes or other written records.

For purposes of this request, the term "records" means information of any kind, including, but not limited to, documents (handwritten, typed, electronic or otherwise produced, reproduced, or stored), letters, e-mails, facsimiles, memoranda, correspondence, notes, databases, drawings, graphs, charts, photographs, minutes of meetings, electronic and magnetic recordings of meetings, and any other compilation of data from which information can be obtained.

To the extent that relevant records are available electronically, please provide these records in that format.

Please be aware that FOIA requires that you respond within 20 working days of your receipt of this request, *see* 5 U.S.C. § 552(a)(6)(A)(i), and that that response must "at least indicate within the relevant time period the scope of the documents [you] will produce and the exemptions[, if any, you] will claim with respect to any withheld documents." *Citizens for Responsibility and Ethics in Washington v. F.E.C.*, 711 F.3d 180, 182-83 (D.C. Cir. 2013).

Further, I respectfully request that you waive all fees in connection with this request as provided by 5 U.S.C. §552(a)(4)(A)(iii) and 5 C.F.R. §1303.70. We have received fee waivers under FOIA from EPA and other federal agencies in the past. This is because Earthjustice has, since 1971, promoted the public interest through the enforcement of federal environmental laws and the advancement of policies that provide enhanced environmental protection.

Fee Waiver Request Justification

Earthjustice is a national, nonprofit, environmental organization with no commercial interest in obtaining the requested information. Instead, Earthjustice intends to use the requested information to inform the public, so the public can better understand the operations and activities of the EPA and OLEM with respect to the regulation of coal combustion residuals under the Resource Conservation and Recovery Act (RCRA).

As explained below, this FOIA request satisfies the factors listed in EPA's governing regulations for waiver or reduction of fees, as well as the requirements of fee waiver under the FOIA statute – that “disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.” 5 U.S.C. § 552(a)(4)(A)(iii), *see also* 40 C.F.R. § 2.107(l). The U.S. Department of Justice (DOJ) has identified six factors to assess whether a requester is entitled to a waiver of fees under FOIA, and the D.C. Circuit and other Courts of Appeals reference and apply these factors.¹ This request complies with each of the factors agencies weigh in a fee waiver determination, as demonstrated below:

1. The subject matter of the requested records must specifically concern identifiable “operations and activities of the government.”

The requested records relate to EPA's regulation of CCR under RCRA. On April 17, 2015, EPA published “Hazardous and Solid Waste Management System; Disposal of Coal Combustion Residuals from Electric Utilities; Final Rule,” 80 Fed. Reg. 21,302 (“CCR rule”). The CCR rule sets forth regulations for management and disposal of CCR generated by electric utilities. In December 2016, Congress passed the WIIN Act, which provides authority to EPA to approve state CCR permit programs to operate in lieu of the CCR rule. Information concerning EPA's evaluation and approval of state CCR permit programs unquestionably involves the “identifiable operations or activities of the government.”

The Department of Justice Freedom of Information Act Guide expressly concedes that “in most cases records possessed by federal agency will meet this threshold” of identifiable operations or activities of the government. There can be no question in this instance that this is the case.

¹ *See, e.g.*, Stephen J. Markman, U.S. Dep't of Justice, FOIA Update, Vol. VIII, No. 1, New Fee Waiver Policy Guidance at 3-10 (1987), available at http://www.justice.gov/oip/foia_updates/Vol_VIII_1/viii1page2.htm; *Judicial Watch, Inc. v. U.S. Dep't of Justice*, 365 F.3d 1108, 1126 (D.C. Cir. 2004) (stating that “for a request to be in the ‘public interest,’ four criteria must be satisfied,” and citing agency's multi-factor fee waiver regulation).

2. The disclosure of the requested documents must have an informative value and be “likely to contribute to an understanding of Federal government operations or activities.”

The Freedom of Information Act Guide makes it clear that, in the Department of Justice’s view, the “likely to contribute” determination hinges in substantial part on whether the requested documents provide information that is not already in the public domain. The requested records are “likely to contribute” to an understanding of your agency’s decisions and EPA’s operations and activities because these documents are not otherwise in the public domain and are not accessible other than through a FOIA request. Given the importance of the state CCR program authorization process and its impact on public safety and the environment, the records requested should be made available to the public. The documents requested are “meaningfully informative” and “likely to contribute” to a greater understanding of EPA’s operations and activities with respect to the CCR rule and EPA’s new authority to approve state CCR permit programs.

3. The disclosure must contribute to the understanding of the public at large, as opposed to the individual understanding of the requester or a narrow segment of interested persons. Under this factor, the identity and qualifications of the requester—i.e., expertise in the subject area of the request and ability and intention to disseminate the information to the public—is examined.

Earthjustice has a longstanding interest and expertise in coal ash and in the rulemaking governing coal ash disposal. More importantly, Earthjustice unquestionably has the “specialized knowledge” and “ability and intention” to disseminate the information requested in the broad manner, and to do so in a manner that contributes to the understanding of the “public-at-large.”

Earthjustice intends to disseminate the information they receive through this FOIA request regarding these government operations and activities in a variety of ways, including but not limited to, analysis and distribution to the media, distribution through publication and email, posting on Earthjustice’s website, and list-serve distribution to members of the public interested in EPA’s authorization of state coal ash permit programs. In addition, Earthjustice maintains a webpage devoted to coal ash at www.earthjustice.org/coalash, and Earthjustice routinely uses this webpage to disseminate information.

4. The disclosure must contribute “significantly” to public understanding of government operations or activities. The public’s understanding must be likely to be enhanced by the disclosure to a significant extent.

There is currently significant public concern regarding the CCR rule and EPA’s duty to authorize state CCR permit programs only if they are at least as protective as the CCR rule. The rule promulgated by EPA was a self-implementing rule, and citizens have a substantial role and interest in enforcement of the rule. Information concerning changes in the public’s ability to enforce the rule and in the stringency of its requirements is of substantial interest to the public. In addition, the WIIN Act guarantees a public comment period on all applications for state CCR permit programs. Disclosure of the requested records will therefore significantly enhance the

public's understanding of compliance and enforcement issues and foster public participation in the EPA authorization process.

Absent disclosure of the records requested, the public will remain uninformed concerning EPA authorization of state CCR permit programs. The disclosure of the requested records is essential to public understanding of the authorization process and the impact that a CCR permit program may have on the safety of their community and environment. After disclosure of these records, the public's understanding of these issues will be significantly enhanced, and meaningful public participation in the authorization process will be fostered. The requirement that disclosure must contribute "significantly" to the public understanding is therefore met.

5. Whether the requester has a commercial interest that would be furthered by the requested disclosure.

Earthjustice has no commercial interest in the requested records. Nor does Earthjustice have any intention to use these records in any manner that "furthers a commercial, trade, or profit interest" as those terms are commonly understood. Earthjustice is a tax-exempt organization under sections 501(c)(3) and 501(c)(4) of the Internal Revenue Code, and as such it has no commercial interest. The requested records will be used for the furtherance of Earthjustice's mission to promote safe and healthy environments for all communities and to inform the public on matters of vital importance to the environment and public health, including from the impacts of coal combustion residuals.

6. Whether the magnitude of the identified commercial interest of the requester is sufficiently large, in comparison with the public interest in disclosure, that disclosure is "primarily in the commercial interest of the requester."

When a commercial interest is found to exist and that interest would be furthered by the requested disclosure, an agency must assess the magnitude of such interest in order to compare it to the "public interest" in disclosure. If no commercial interest exists, an assessment of that non-existent interest is not required.

As noted above, Earthjustice has no commercial interest in the requested records. Disclosure of this information is not "primarily" in Earthjustice's commercial interest. On the other hand, it is clear that the disclosure of the information requested is in the public interest. It will contribute significantly to public understanding of federal and state regulation of coal combustion residuals.

Earthjustice thus respectfully requests, because the public will be the primary beneficiary of this requested information, that EPA waive processing and copying fees pursuant to 5 U.S.C. § 552(a)(4)(A).

In the event that your Office denies a fee waiver, please send a written explanation for the denial but continue to produce documents until the fee reaches \$100.

Please produce the requested records on a rolling basis. At no time should the Office's search for, or deliberations concerning, any records requested herein delay the production of other records that the Office has already elected to produce.

If you regard any of the requested records to be exempt from required disclosure under FOIA, we request that you disclose them nevertheless; as such disclosure would serve the public interest of educating citizens. *See* 10 C.F.R. §1004.1 (authorizing disclosure of documents exempt from FOIA disclosure where such disclosure is in the public interest).

In addition, should you invoke a FOIA exemption regarding any of the requested records, we request that you release any segregable portions of such records that are left after the exempted material has been redacted from the records we are seeking.

Please send the requested records by email to mozaeta@earthjustice.org or, for records not available electronically, by regular mail to 1617 John F. Kennedy Blvd., Suite 1130, Philadelphia, PA 19103. If you find that this request is unclear in any way, please do not hesitate to contact me by phone at (215) 717-4529.

Thank you for your time and assistance. I look forward to your prompt reply.

Sincerely,

/s/ Mychal Ozaeta

Mychal Ozaeta
Attorney
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